

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
WILLIAM L. SWANSON, OFFICER OF	:	
POPPIN'S OF GLENS FALLS, INC.	:	DETERMINATION
	:	DTA NO. 807565
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1984	:	
through February 28, 1987.	:	

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Petitioner William L. Swanson, officer of Poppin's of Glens Falls, Inc., c/o John C. Mannix, Jr., Miller, Mannix & Pratt, P.C., One Broad Street Plaza, P.O. Box 765, Glens Falls, New York 12801 filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through February 28, 1987.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on October 16, 1991 at 9:15 A.M., with all briefs to be submitted by April 30, 1992. On April 1, 1992, the Division of Tax Appeals received the Division of Taxation's submission of written interrogatories of petitioner. Petitioner's memorandum of law was submitted on March 17, 1992. The Division of Taxation's brief was submitted on April 13, 1992. Petitioner appeared by Miller, Mannix & Pratt, P.C. (John C. Mannix, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

ISSUES

I. Whether petitioner's motion to dismiss for failure to file a timely answer should be granted.

II. Whether the Division of Taxation's failure to proceed against the corporation in its

bankruptcy proceeding has prejudiced petitioner.

III. Whether William L. Swanson was a person required to collect tax on behalf of Poppin's of Glens Falls, Inc. within the meaning of Tax Law §§ 1131 and 1133.

IV. Whether petitioner has shown that the failure to timely file and pay over sales tax was due to reasonable cause and the absence of willful neglect.

V. Whether it has been established that a portion of one of the assessments is time barred by the statute of limitations.

#### FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner, William L. Swanson, two notices of determination and demands for payment of sales and use taxes due dated February 8, 1988. The first (No. S880208723A) was for the period March 1, 1984 through November 30, 1985 and assessed total tax due of \$7,522.80, plus penalty and interest. The second (No. S880208722A) covered the period December 1, 1985 through February 28, 1987 and assessed total tax due of \$18,499.42, plus penalty and interest. Both of the notices issued contained the following explanation:

"The tax assessed above has been estimated in accordance with the provisions of Section 1138(a)(1) of the Tax Law . . . . You are liable individually and as officer of (Poppin's of Glens Falls, Inc.) under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Law."

A conciliation conference was subsequently held and the statutory notices were adjusted as follows: Notice No. S880208722A was reduced to \$6,700.56 reflecting the tax as due according to the sales tax returns filed at the conciliation conference for the corporation. Such tax had previously been estimated by the Division. Total tax assessed by Notice No. S880208723A of \$7,522.80 was sustained. However, interest for the quarter ending May 31, 1984 was cancelled since the time to assess tax, penalty and interest on the corporation for that period had expired at the time of the issuance of the notice to the corporation. Thus, the total tax due after adjustments as asserted by the Division is \$14,223.36, plus penalty and interest. This amount is reflected in the amended Conciliation Order dated August 18, 1989.

Thereafter petitioner filed a timely petition with the Division of Tax Appeals which was received on November 14, 1989 asserting that petitioner was incapacitated for much of the period covering the quarters in issue and thus was not a person responsible for the collection and payment of tax; that the statute of limitation had run with respect to some of the periods; and that the failure to file and pay taxes as due was attributable to reasonable cause and not due to willful neglect. The Division submitted its answer with correspondence dated February 1, 1990, 79 days after the filing of the petition.

Poppin's of Glens Falls, Inc. ("Poppin's") was a restaurant operating in the Northway Plaza in Glens Falls, New York. It was incorporated in the State of New York on December 5, 1983 and commenced doing business, according to petitioner's son, during the early part of February 1984. Christopher Swanson (petitioner's son) has been associated with the business since its inception and provided testimony as to some of the details of what took place during its few years of business operation.

At the time the business was opened William Swanson, Christopher Swanson and an unrelated party referred to as Dr. Jenkins managed the restaurant. Shortly thereafter, on February 16, 1984, petitioner suffered a heart attack for which he was admitted to the hospital. The hospital discharge summary provided by petitioner's representative indicates that petitioner was admitted to the hospital with an acute inferior wall M.I. (myocardial infarction). Petitioner remained hospitalized until his discharge on March 1, 1984. The discharge summary indicates that upon his release he was to be followed carefully as an outpatient, that he would be seen in the office in about 10 days and was instructed to restrict his activities to those around his home until he had received a follow-up examination. Christopher Swanson provided testimony which confirmed the fact that his father suffered a heart attack and was hospitalized shortly after the opening of Poppin's. According to Christopher Swanson's further testimony, after his father's discharge from the hospital, he did not return to Poppin's on a regular basis. He did not review daily cash totals or participate in the general supervision or the day-to-day management of the restaurant. He stated that his father did not return to the business to perform duties as a

manager until the latter part of 1986. Petitioner's son indicates that the reason his father did not return to the business in a managerial capacity was pursuant to the instructions petitioner received from his doctor.

Dr. Jenkins was identified as a consultant who also held a teaching position in the culinary curriculum at Adirondack Community College (a local community college). According to the testimony of Christopher Swanson, he and Dr. Jenkins were in charge of the business of the restaurant on a day-to-day basis after petitioner's heart attack. Dr. Jenkins would take care of the normal operation of the restaurant, including the kitchen, the waiters and waitresses, bar supplies, and other general aspects of the entire operation. He maintained the authority to hire and fire employees and was paid a salary from the business. Christopher Swanson handled cashing out registers, inventory, employee matters and general expenditures. Christopher Swanson also had the authority to hire and fire employees, but did not receive a salary from Poppin's. Both Christopher Swanson and petitioner had the authority to sign checks and both signatures appear on a bank record submitted into evidence as authorized signatories. However, it is clear from the document that only one signature was required to effectuate a transaction.

Christopher Swanson testified that he was an officer and shareholder of Poppin's. However, there is other conflicting information submitted into evidence by the Division which does not confirm Christopher Swanson's shareholder status. On or about February 15, 1984, petitioner executed an Election by Shareholders of a Small Business Corporation (Subchapter S Election) on which he listed himself as the only shareholder, owning 100 shares of stock. In addition, Federal corporate income tax returns (Form 1120S) for the years 1984, 1985 and 1986 all indicate that petitioner was the sole shareholder of the corporation, owning 100% of the stock. Form 1120S for 1987 also shows petitioner as owning 100% of the stock with the number of shares owned by him as 100.

During his period of employment at Poppin's, Christopher Swanson also maintained a position with W. L. Christopher, Inc., a managing company of the Northway Plaza.

Petitioner's representative indicated that petitioner was unable to appear at the hearing and provide testimony due to a continuing medical problem which had been documented by a doctor's letter sent to the Division of Tax Appeals. Correspondence dated March 25, 1991 and June 7, 1991 from Dr. Fredric Fagelman indicates that petitioner suffers from a chronic back condition exacerbated by a fall resulting in a leg fracture. Dr. Fagelman stated that due to these medical problems, petitioner should refrain from driving to Troy (the location of the hearing). Prior to the time when the parties agreed upon arrangements for the taking of a deposition in lieu of petitioner's testimony, the Administrative Law Judge in this matter suggested to petitioner's representative "[t]hat within thirty days you submit to me the affidavit of Mr. Swanson as complete as he might have so testified if he were able to appear." The affidavit of Mr. Swanson, surprisingly brief, is reproduced below:

"WILLIAM L. SWANSON, being duly sworn, deposes and says:

"1. I am the petitioner in this matter and I am making this affidavit to supplement the record herein as provided for by the hearing tribunal at the hearing held October 16, 1991.

"2. The petitioner's contention throughout this proceeding has been that due to severe medical incapacity, he was not a person 'responsible' for collection of sales taxes for the periods at issue. Petitioner has never denied that he was an officer or shareholder of the defaulting corporation.

"3. On February 17, 1984 I suffered a debilitating heart attack and was taken to the Glens Falls Hospital. I was discharged from the hospital on March 1, 1984 and was instructed by my doctors to remain in bed, and in no case was I to leave my house. I did not resume any activities with respect to the above corporation until October of 1986. It was not that I avoided my responsibilities, rather I believed that trustworthy people had been employed to take care of the business. Furthermore, I believed that were there any problems with this business, I would have been notified. I never received any information until my return to the business in October, 1986 that there were serious problems.

"4. When I returned to the business, I discovered serious problems of theft within the organization and what essentially amounted to total chaos. It was only then that I discovered that the sales taxes had not been paid over to the State.

"5. As a result of my medical incapacity, I did not have the duty of management and maintenance of the corporate books; nor was I responsible to review and file any of the corporate tax returns.

"6. My position with Poppins of Glens Falls, Inc., unfortunately, was that of a passive investor.

"7. So that the record is clear, I never received any distributions from this corporation in any capacity, as salary, dividends, or distributions of any kind. I have never been benefited financially from having owned this restaurant."

The Division submitted to petitioner written interrogatories for which petitioner provided responses. Some of the information revealed by the interrogatories was as follows:

(a) Petitioner conceded to having signed corporate checks between February 17, 1984 and October 31, 1986 as his health permitted. No further explanation was provided.

(b) Petitioner was asked whether he reported the income, profits or losses incurred by Poppin's in 1984, 1985, 1986 or 1987 on his personal income tax return for the respective years. Petitioner did not have any recollection of doing so.

(c) Petitioner indicated on the 1986 and 1987 schedule K-1 attached to Form 1120S that he "materially" participated in the business activities of the corporation in those years. He said he did so to the extent that his health permitted with no further explanation.

(d) Petitioner conceded that it was possible that he allowed other persons who were neither directors nor shareholders of the corporation to conduct certain business affairs of the corporation.

(e) Petitioner agreed that it was possible that he had communicated with employees of the corporation regarding corporate business affairs on numerous occasions after his release from Glens Falls Hospital.

(f) Petitioner conceded that it was possible that he communicated with employees regarding the day-to-day business affairs of the corporation even if not so on a daily basis. He said that he gave certain employees permission to transact the corporation's business affairs on his behalf.

(g) Petitioner did not recall the application of a \$60,000.00 loss in income reported on his personal income tax return as a pass-through from Poppin's as a subchapter S corporation.

(h) Petitioner indicated that he first contacted an attorney with respect to filing a petition in bankruptcy on behalf of Poppin's in April or May (presumably 1986).

(i) Petitioner did not recall when his doctor advised him that he no longer had to

remain in bed recuperating.

(j) When petitioner was questioned as to whether his doctor advised him not to go to work during the period between March 1, 1984 and September 30, 1986, he indicated he was not prohibited from working but that his work habits were restricted. No further explanation was provided.

(k) When asked how often he visited the business premises of Poppin's during the period March 1, 1984 through September 30, 1986, he indicated he did so frequently for lunch or dinner.

The Division introduced a number of documents in an attempt to show petitioner's involvement with Poppin's during the period he was allegedly incapacitated. Mr. Swanson's signature appears on a document entitled "Election by Shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes" which he dated February 15, 1984.

Additionally, the Division introduced two documents regarding bank accounts. The first was a resolution for bank accounts in the corporate name indicating that William L. Swanson and Christopher L. Swanson were authorized to effectuate transactions on behalf of Poppin's. They held the titles of owner and manager of the corporation, respectively. A copy of the bank signature card attached to the bank resolution shows the signatures of the two parties and indicates that petitioner was the president of the corporation and his son was the manager. The bank signature card also indicated that for purposes of checks only one signature was required. This account was the business checking account as indicated by the testimony of Christopher Swanson which was established at Chase Lincoln First Bank prior to the opening of the business in February 1984.

Mr. Swanson's signature appears at the bottom of Form CT-3S covering the period December 5, 1983 to December 31, 1983. The Form is entitled "New York State Small Business (Tax Option) Corporation Information Report" and it is dated May 21, 1984. The Division also introduced additional Forms CT-3S into evidence; however, for the years 1985,

1986, 1987, 1988 and 1989, such forms were signed by Mr. Swanson on October 2, 1990.

Attached to the written interrogatories and introduced into evidence were Forms 1120S (U.S. Income Tax Return for an S Corporation) pertaining to Poppin's for the years 1984, 1985, 1986 and 1987. A comparison of the end-of-year balance sheet for 1984 and the beginning of the tax year balance sheet for 1985 with specific reference to an attached schedule listing a breakdown of current liabilities reveals a note payable from William L. Swanson (WLS) in the amount of \$211,861.00. With that amount having appeared on the end-of-year balance sheet for 1984, the sum was loaned to the corporation sometime between the commencement of business in February 1984 and the end of that year. The note payable from the corporation to petitioner increased during 1985 by nearly \$16,000.00. The Division, in its interrogatories, requested information from petitioner regarding the notes payable from the corporation and referred specifically to the sums indicated in the balance sheet and described above. The only comments petitioner made with respect to the questions about such loans were that "the written documents speak for itself [sic]." He provided no additional information about the nature, purpose or the timing of such loans.

In addition, the 1984 Form 1120S reflects the purchase of capital stock by petitioner for \$60,000.00. A schedule attached to the 1986 Form 1120S indicates that petitioner acquired common stock on December 5, 1983 (the date of incorporation) for \$60,000.00 and such sum was the amount that petitioner had "at risk" for purposes of the pass-through of corporate losses on petitioner's personal income tax return. The schedule also indicates that a \$60,000.00 loss was distributed to petitioner at the end of the corporation's calendar year 1984.

Christopher Swanson provided testimony that petitioner had no involvement with Poppin's between the time he was admitted into the hospital until sometime in late 1986. He did, however, indicate that petitioner had contact with him and secretaries of the corporation with respect to certain problems facing the corporation. In addition, petitioner had contact with Loretta Swanson, his sister, who assisted in the daily business operations of the restaurant after petitioner's heart attack.



Petitioner first contacted an attorney with respect to filing a petition in bankruptcy on behalf of Poppin's during April or May 1986. Petitioner's representative indicated at the time of the hearing that there was currently a Chapter 7 bankruptcy proceeding in process. It was also indicated that the bankruptcy trustee has maintained a fund available to pay the taxes. By correspondence dated July 16, 1991, petitioner's representative, John Mannix, Jr., indicated that the bankruptcy proceedings of Poppin's had been converted from a Chapter 11 action to Chapter 7 liquidation proceedings. He acknowledges in this correspondence that there were outstanding claims by New York State Department of Taxation and Finance for unpaid sales tax for quarters commencing in 1984 through 1987 and urged the State to assert its claims in bankruptcy for payment of such taxes. Petitioner's representative received correspondence from Anthony DeStefano, a manager of bankruptcy/special procedures section, Tax Compliance Division, indicating what he believed the State's position to be with respect to the distribution of funds under the Chapter 7 proceeding.

Christopher Swanson's testimony indicated that the corporation attempted to staff its business office with experienced bookkeepers. During the nearly three-year period of time covered by the sales tax quarters in issue there were two or three different bookkeepers and Poppin's books and records were reviewed by accountants. It is petitioner's contention that the persons to whom such responsibility was delegated began a practice of failing to file and pay appropriate sales taxes due.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts that the Division's failure to file a timely answer as well as its failure to proceed in the bankruptcy proceeding of Poppin's for funds due has prejudiced petitioner. Petitioner asserts that the Division avoided its duties to act in a timely and diligent manner and instead relied on petitioner's liability as a responsible officer, which was clearly prejudicial to petitioner.

With respect to his status as a responsible officer, petitioner asserts that although he caused the corporation to be established, following the commencement of the business he had

no involvement with it during the periods in question other than to provide additional capital. Petitioner relied on his son, Christopher Swanson, who was in charge of the corporation and asserts that he was unaware of the failure to pay over the sales taxes as due. As to penalties assessed in this matter, petitioner claims he was not aware that the taxes were not being paid as properly due and, as a result, it would be a grave injustice to assert penalties and interest against him since the failure to pay over taxes was based on reasonable cause and not willful neglect.

Although the parties agreed at hearing that the statute of limitations issue was handled and appropriate adjustments made at the conciliation conference, in petitioner's brief he raises the argument that since the assessments were dated February 8, 1988 assessment of any tax shown on returns filed before February 7, 1985 is time-barred under Tax Law § 1147. Thus, Notice Number S880208723A is affected insofar as tax, interest and penalties for the quarters ended in 1984 are time-barred.

The Division asserts that petitioner has failed to show that its late-filed answer or the manner in which it has proceeded against petitioner's corporation in bankruptcy has prejudiced petitioner in any way. With respect to his status as a responsible officer, the Division concedes that petitioner's alleged illness may have necessitated delegation of duties for a portion of the period in issue. This does not, however, vitiate petitioner's status as a responsible officer. He has failed to show that his purported serious illness precluded timely compliance with the Tax Law. Thus, petitioner has not established reasonable cause for failure to file.

#### CONCLUSIONS OF LAW

A. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that:

"The Law Bureau shall serve an answer on the petitioner or the petitioner's representative, if any, within 60 days from the date the supervising administrative law judge acknowledged receipt of a petition in proper form." (20 NYCRR 3000.4[a][1].)

Time periods imposed upon an administrative agency for a responsive pleading are directory rather than mandatory (Matter of Geary v. Commr. of Motor Vehicles, 92 AD2d 38, 459 NYS2d 494, affd 59 NY2d 950, 466 NYS2d 304). Generally, an agency's failure to act within a specified period will not result in dismissal of the agency's action in the absence of a

showing of substantial prejudice as a result of the delay (Matter of Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 495 NYS2d 927), cert denied 476 US 1115 [1986]; Matter of Geary v. Commr. of Motor Vehicles, supra; Matter of G. H. Walter & Co. v. State Tax Commn., 62 AD2d 77, 403 NYS2d 811).

Petitioner asserts that an answer filed by the Division 19 days late affected the Division's action against the bankrupt corporation thereby treating petitioner in a prejudicial manner. Petitioner's argument is without substance and he has not established that he has been prejudiced in any way by the three-week delay by the Division.

B. Petitioner asserts that the Division has avoided duties imposed upon it to act in a timely and diligent manner by its refusal to challenge a questionable superior priority claim of another party in bankruptcy court. As a result, petitioner argues that he has been prejudiced since the Division seeks to impose liability upon him as a responsible officer rather than appropriately filing a claim against the assets of the bankrupt corporation. Petitioner takes the position that as long as the bankruptcy proceeding involving the corporation is pending, any action against petitioner as officer of the corporation works an injustice upon him and is improper. This argument is without merit. The corporation's filing for bankruptcy does not relieve petitioner of his personal liability for the taxes, penalty and interest which have been assessed (see, Matter of Hanellin School Photography, State Tax Commn., July 15, 1983; Matter of Bressner, State Tax Commn., June 19, 1981). The State Tax Commission stated:

""[t]he court's interpretation of the Federal bankruptcy law does not excuse an officer of a corporation under a duty to act from personal liability for interest or penalties due New York State under Article 28."" (Matter of Bressner, supra, citing Ruhter v. Internal Revenue Serv., 339 F2d 575.)

Consequently, the corporation's filing for bankruptcy has no relevance to the liability at issue herein.

C. Tax Law § 1133(a) imposes personal liability for the tax imposed, collected or required to be collected under Article 28 upon every person required to collect any tax imposed. Tax Law § 1131(1) defines persons required to collect such tax and includes any officer who is under a duty to act for the corporation in complying with any requirement of Article 28. The

question to be resolved here is whether petitioner had sufficient authority and control over the affairs of the corporation in spite of his alleged medical incapacity to be considered a person required to collect tax (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of each case (Matter of Constantino, *supra*; *see*, Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Vogel v. New York State Dept. of Taxation and Fin., 98 Misc 2d 222, 413 NYS2d 862; Matter of Hall, Tax Appeals Tribunal, March 22, 1990; Matter of Barton, Tax Appeals Tribunal, December 28, 1989; Matter of Baumvoll, Tax Appeals Tribunal, November 22, 1989; Matter of Martin, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239; Matter of D & W Auto Service Center, Tax Appeals Tribunal, April 20, 1989; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988; Matter of Stern, Tax Appeals Tribunal, September 1, 1988). Factors identified as indicia of responsibility include:

"The individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; [and] the individual's economic interests in the corporation (citations omitted)" (Matter of Constantino, *supra*).

D. Petitioner meets a significant portion of the criteria used in determining whether an individual is a responsible officer of the corporation. Petitioner was president of the corporation, sole stockholder<sup>1</sup> and an authorized signatory on the corporate checking account.

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<sup>1</sup>Numerous documents submitted into evidence indicate that petitioner was the sole stockholder of the corporation. The only contrary evidence of stock ownership in the corporation is that of Christopher Swanson's testimony and a page of the bankruptcy petition that is somewhat unidentifiable. Christopher Swanson's testimony was that of a struggling, young businessman who appeared not to have a great deal of experience in the business world. I was not convinced by his testimony that he was likely to have known what steps were necessary to be taken by the corporation for him to have owned an equal number of shares of corporate stock. His seeming lack of experience in corporate matters and the lack of supporting documentary evidence are the reasons that I failed to accept as a fact his statement that he owned an equal number of shares of corporate stock.

Petitioner discussed the business with Christopher Swanson and Dr. Jenkins as well as with other employees of the corporation. Petitioner

claimed a distributive share of the (subchapter S) corporation's ordinary losses on his personal income tax return and thereby derived economic benefit from his stock ownership. It can be assumed from the substantial loans made by petitioner to the corporation that he had knowledge of and control over the financial affairs of the corporation even if such were designated to be performed and handled by other persons. He had the authority to hire and fire employees and sign checks even though he claims to have done so only when his health permitted. In addition, certain tax returns and other corporate documents were signed by petitioner during the period in question.

The gravamen of petitioner's argument in this case is that he suffered a debilitating heart attack when the restaurant first opened and then was unable to participate in the management of the corporation from that day forward until it was facing the filing of bankruptcy 2½ years later. The only item of evidence petitioner supplied to support his position of medical incapacity to potentially absolve himself of his management ability during the period in question is his discharge summary from Glens Falls Hospital. This document indicated he was to be seen in a follow-up examination approximately 10 days after his discharge on March 1, 1984. Petitioner contends his incapacity and doctor's orders prohibited him from involvement in the corporation for two succeeding years, but presented no evidence to substantiate the same. Petitioner was not precluded from inspecting the corporate books or inquiring into the financial and management activities of the corporation. He admits frequent visits to the restaurant, though claims the visits were for lunch or dinner. The information provided by his affidavit and the responses to the written interrogatories in both cases were brief, evasive and essentially uninformative. It was petitioner's contention that he did not avoid responsibilities, but rather employed other trustworthy persons to handle such matters. The case law clearly establishes

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that:

"[c]orporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301, 303).

Although petitioner may not have been present to manage each and every day-to-day activity of the corporation, the evidence in this case supports the conclusion that petitioner had or could have had sufficient authority and control over corporate affairs and therefore was under a duty to act for the corporation in complying with Article 28 of the Tax Law (see, Matter of Pais, Tax Appeals Tribunal, July 18, 1991).

E. Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for failure to file a return or to pay any tax under Article 28 in a timely manner. Tax Law § 1145(a)(1)(iii) (and former § 1145[a][1][ii]) further provides that if the failure or delay was due to reasonable cause and not willful neglect, penalty and that portion of interest which exceeds the minimum amount of interest prescribed by law shall be remitted. In order for the penalties to be abated, the burden is on petitioner to establish reasonable cause as well as the absence of willful neglect. Petitioner did not meet his burden in this case. It is therefore concluded that petitioner is properly held liable for the penalty and interest assessed in this matter.

F. Tax Law § 1147(b) provides that no assessment of additional tax shall be made after the expiration of more than three years from the date of filing of a return. It is well established that the statute of limitations defense is waived unless affirmatively raised by the taxpayer (see, Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of Convissar v. State Tax Commn., 69 AD2d 929, 415 NYS2d 305; Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887). To establish this defense, the taxpayer must proceed forward with a prima facie case showing the date on which the limitation period commences, the expiration of the statutory period and receipt or mailing of the notice after the running of the period (Matter of Richards, Tax Appeals Tribunal, December 3, 1991; see also, Amesbury Apts., Ltd. v. Commr., 95 TC 227; Matter of Jencon, Tax Appeals Tribunal, December 20, 1990). Where the taxpayer has satisfied this initial

burden, the burden of going forward with the evidence shifts to the Division to demonstrate that the bar of the statute is not applicable. The Division then must proceed with countervailing evidence that the statutory notice was timely mailed (Matter of Richards, supra; see also, Coleman v. Commr., 94 TC 82).

Although the parties agreed at the hearing that the statute of limitations issue on certain quarters had been resolved, petitioner thereafter raised the statute of limitations as a defense in his brief. However, petitioner failed to introduce the evidence necessary to present a prima facie case to support the statute of limitations defense. At the hearing, petitioner referred to the sales tax returns for the purpose of establishing the existence of various bookkeepers employed by the corporation. However, petitioner's representative did not at that time, though given an opportunity, introduce them into evidence to either establish that fact or the date of filing. In absence of any evidence that the notices of determination and demands for payment of sales and use taxes due dated February 8, 1988 were received after the expiration of the statutory period, petitioner has failed to show an essential element of the statute of limitations claim. Thus, no portion of the assessments in issue is deemed time-barred by the statute of limitations.

G. The petition of William L. Swanson, officer of Poppin's of Glens Falls, Inc., is hereby denied and the notices of determination and demands for payment of sales and use taxes due dated February 8, 1988, except as modified by the Bureau of Conciliation and Mediation as described in Finding of Fact "2", are hereby sustained in their entirety.

DATED: Troy, New York  
January 21, 1993

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE